Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-641

JOHNNY W. BOWMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

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JOHNNY W. BOWMAN,

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UNITED STATES OF AMERICA,

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PETITION FOR WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

This is a Petition for JOHNNY W. BOWMAN for a Writ of Certiorari to review the Memorandum filed by the United States Court of Appeals for the Ninth Circuit on June 26, 1979, refusing to reverse Mr. BOWMAN's conviction for knowingly and intentionally possessing with intent

to distribute approximately 132 grams of cocaine in violation of Title 21, United States Code Section 841(a)(1). The United States Court of Appeals for the Ninth Circuit ruled that the search warrant issued for Mr. BOWMAN's residence was supported by probable cause. Specifically, the Court found that the activities observed by the surveilling agents established a rational inference to believe that the cocaine found on a Mr. Berroteron and a Mr. Short came from Mr. BOWMAN's residence and that a search of that residence would produce additional evidence of narcotics violations.

OPINIONS BELOW

To the Petitioner's knowledge, the opinion in the United States Court of Appeals for the Ninth Circuit, affirming Petitioner's conviction, has not been officially or unofficially reported as yet. (A copy of the Memorandum issued by the Ninth Circuit Court of Appeals is attached hereto as Appendix "A".)

JURISDICTION

1. On April 19, 1978, the Federal Grand Jury for the Southern District of California returned a Three-Count Indictment against Petitioner BOWMAN and his wife charging violations of Title 21 U.S.C. §§ 841(a)(1) and 846.

2. On September 13, 1978, Petitioner was tried before the Honorable Howard B. Turrentine, United States District Judge, on "stipulated facts," and was convicted of knowingly and intentionally possessing with intent to distribute approximately 132 grams of cocaine (Count III). On November 20, 1978, Petitioner was committed to the custody of the Attorney General for a period of five years. It was further ordered that Petitioner serve a Special Parole Term of five years as proscribed by Title 21, U.S.C. § 841(b)(1)(A). Petitioner thereafter filed a timely Notice of Appeal.

3. On June 26, 1979, the United States Court of Appeals for the Ninth Circuit affirmed BOWMAN's conviction and on September 12, 1979, BOWMAN's Petition for Rehearing and Suggestion for Rehearing In Banc was denied by said Court.

4. The jurisdiction of this Court is invoked under Title 28, U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. **Were the activities observed by the surveilling agents sufficient to establish probable cause for the issuance of a search warrant for Petitioner's residence?**

2. **What effect should a decision from a different panel of the same Court, involving the identical facts, have upon a decision rendered by another panel?**

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. **Fourth Amendment to the United States Constitution:**

"The right of the people to be secure in

their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

2. **Title 21, U.S.C. § 841(a)(1)**
Section 841. Prohibited acts A–Unlawful acts.

"(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally–

"(1) to manufacture, distribute, or dispense, a controlled substance."

STATEMENT OF THE FACTS

On March 29, 1978, at approximately 10:15 p.m., agents of the Narcotics Task Force (N.T.F.) on duty at the San Diego International Airport observed David Berroteron and Rodney Short walking through the concourse area. Because of their suspicious behavior and the fact that the two individuals fit the "profile" of a narcotics trafficker,[1] surveillance was established.

The two individuals were followed when they left the airport by taxi. The taxi took them to Santee, a drive of about forty-five minutes. During the course of the drive

[1]Both individuals appeared very nervous and were constantly looking around as if looking for someone. Neither had any luggage, but one individual had a briefcase while the other individual was carrying another small case.

to Santee, the agents observed the individuals from time to time look out the back window of the cab, as if checking for anyone following them. The two individuals exited the cab about a block and one-half from Petitioner's residence located at 9756 Yellowstone Place, Santee. The two individuals walked the remaining block and one-half to the residence, arriving at approximately 10:55 p.m.

Berroteron and Short remained at the residence over night. Throughout the evening, the surveilling agents observed allegedly "suspicious" activities in and around the residence. When some noisy activity took place at a nearby house, the lights in Petitioner's residence were observed to go out and the drapes open. Someone then appeared to look out and, after the people who had been making the noise left, the drapes were closed and the lights were turned back on. At approximately 11:35 p.m., a 1975 Cadillac was observed to drive to the residence and the driver entered the house. Approximately one-half hour later, a car drove through the cul-de-sac street on which Petitioner's residence is located and, as the car's headlights went past the house, the lights in the residence went out. The agents then observed someone to peer out through the drapes and, about a minute to a minute and one-half later, the lights were again turned on. At approximately 12:30 a.m., Petitioner and Berroteron exited the residence and entered a red Ford Courier pick-up truck. They drove to a U-Totem store and returned. A few minutes later, Petitioner went from the residence to the Cadillac, where he was observed to remain for about three or four minutes with the lights going on and off and some activity taking place in the car. He then returned to the residence.

The next morning, Petitioner, Berroteron and Short left the residence in the Courier pick-up truck at approximately 8:00 a.m. The truck stopped at R. W. Little Company, the registered owner of the Courier. Petitioner was observed to enter the office and, a few minutes later, another man entered the truck and drove off. The truck proceeded to the San Diego Airport, arriving at approximately 8:40 a.m. Berroteron and Short entered the terminal, went to the P.S.A. desk, and purchased flight tickets in the names of Short and Vargas. The two men then went to the bar where they had cocktails until about eight minutes prior to the scheduled departure of their flight.

When Berroteron and Short attempted to pass through the security gate, they were contacted by N.T.F. agents and escorted to the Harbor Police Office. When questioned concerning his identity, Berroteron admitted that his name was Berroteron, but said that he traveled under the name of Vargas all the time. One of the N.T.F. agents recalled that Berroteron had recently been convicted of smuggling approximately one-half ton of marijuana in a San Diego case and that he was also a subject of a current investigation involving airplane smuggling of narcotics.

The two individuals were informed that the agents were conducting a narcotics investigation and both men were asked for permission to search their bags. Both Berroteron and Short voluntarily consented to the search of the briefcase and the shaving kit. When the shaving kit was emptied, a tennis ball can was observed inside. When the agent picked it up, it appeared to be unbalanced. After receiving permission from Berroteron to open the tennis ball can, the agent observed that there was only one tennis ball in it and that

a part of the can was cut off and was, in fact, a secret compartment. Knowing that this was a common method of smuggling narcotics, and finding the compartment to be empty, the agents placed Berroteron under arrest and, during a subsequent pat-down search, a "baggie" of marijuana and two "baggies" containing about five ounces of cocaine were seized from Berroteron's boots.

The briefcase was then opened and a can of shaving cream was examined. When it too felt unbalanced, it was opened and also found to have a hidden compartment. Short was then placed under arrest and a plastic bag containing cocaine was found in each of his boots during a pat-down search. A paper bundle of cocaine was also found in his breast pocket along with a note with Donna Bowman's name, address and telephone number on it.

Based on the previously observed activities and the finding of the cocaine, a federal search warrant was obtained for Petitioner's residence. A search of the residence uncovered approximately five ounces of cocaine, small amounts of marijuana, and $12,400 cash. After conducting the search of the residence, surveillance agents were notified to arrest Petitioner. At the time of his arrest, a brown briefcase was seized and searched and found to contain $2,140 and a book with notations concerning narcotics dealings.

Berroteron and Short were charged in a separate case with narcotics offenses involving the nine ounces of cocaine that they were transporting. They each brought motions to suppress, which were granted by Judge Turrentine on the basis that the Government agents did not have an adequate founded suspicion to make the initial stop at the airport. On February 20, 1979, the Ninth Circuit Court

of Appeals, in an unpublished Order (attached hereto as Appendix "B"), affirmed the decision of the District Court ordering the evidence seized from Berroteron and Short suppressed.

REASONS WHY THE WRIT SHOULD BE GRANTED

In concluding that the activities observed by the surveilling agents established a rational inference to believe that the cocaine found on Berroteron and Short came from Petitioner's residence and that a search of that residence would produce additional evidence of narcotics violations, the particular panel of the Court unfortunately ignored voluminous case authority which preclude a finding of probable cause for either an arrest or search based upon mere "suspicions," "beliefs" or "conclusions." Another panel of the Court had previously recognized this principle in holding that the activities observed in the instant case did not even amount to a "founded suspicion" (Appendix "B," p. 4) to detain Berroteron and Short at the airport. While Petitioner admittedly did not have standing to raise the unlawfulness of that detention in his own case, it is still submitted that the decision in that case should have had a greater bearing on the outcome of this case. The only distinguishing factor between the two cases was the discovery of cocaine on Berroteron's and Short's person. But, considering that no contraband or any other illegitimate activity whatsoever was observed to have taken place at Petitioner's residence during the previous evening, it was total speculation on the part of the agents that Petitioner was the source

of the narcotics. And, considering that Petitioner had no history of narcotics dealings or any other criminal record, it was further speculation that his residence contained evidence of narcotics trafficking.

It is difficult to understand how two panels from the same Court could have reached such opposite results while reviewing almost identical facts. It is precisely the inconsistency of these two rulings which requires the granting of this Petition for Writ of Certiorari. Justice and continued faith in our judicial system demand such a result.

ARGUMENT

The Activity Observed By The Surveilling Agents Was Insufficient To Establish Probable Cause For The Issuance Of A Search Warrant For Petitioner's Residence.

It is fundamental that a search warrant should only be issued upon facts showing probable cause. (United States Constitution, Amendment IV; *Brinegar v. United States,* 338 U.S. 160, 175, 69 S. Ct. 1302, 1311 (1948). The requirement of probable cause interposes the magistrate between the police officer's zealous pursuit of suspects and evidence and the citizen's pursuit of privacy and freedom from unreasonable interference. The magistrate's function in this scheme is to render a neutral and detached judgment, not to serve as a perfunctory rubber stamp for the police. *Aguilar v. Texas,* 378 U.S. 108, 84 S. Ct. 1509 (1964).

Probable cause to issue a warrant is said to exist when

the facts and circumstances shown in the affidavit would warrant a man of reasonable caution to believe that the items to be seized were in the stated place. *Brinegar v. United States, supra,* 338 U.S. at 175-176, 69 S. Ct. at 1311; *United States v. Kalama,* 549 F.2d 594, 595 (9th Cir. 1976). In determining the existence of probable cause, the magistrate should read "the affidavit as a whole [,] . . . giving the language a common sense and realistic interpretation . . . " *United States v. Bowers,* 534 F.2d 176, 182, n. 5 (9th Cir.), *cert. denied,* 429 U.S. 942, 97 S. Ct. 360 (1976); *acc'd, United States v. Fried,* 576 F.2d 787, 790 (9th Cir. 1978); *United States v. Lucarz,* 430 F.2d 1051, 1055 (9th Cir. 1970). As stated by this Court in *United States v. Ventresca,* 380 U.S. 102, 108-109, 89 S. Ct. 741, 746 (1965):

> "[T]he Fourth Amendment commands, like all constitutional requirements, are practical and not abstract. If the teachings of the Courts' cases are to be followed and the constitutional policies served, affidavits for search warrants, such as the one involved here, must be tested and interpreted by magistrates and courts in a common sense and realistic fashion. They are normally drafted by non-lawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once extracted under common law pleadings have no proper place in this area. A grudging or negative attitude by reviewing courts towards warrants will tend to discourage police officers from submitting their evidence to a judicial

> officer before acting."

Nevertheless, the courts have also recognized that a warrant cannot stand, even with the aid of constructional guides, if the affidavit is not based on information from which the magistrate can make an independent determination of probable cause. Just as mere suspicion or the existence of a possibility that defendants have committed a crime do not justify an arrest (see *Mangaser v. United States,* 336 F.2d 971, 974 (9th Cir. 1964)), an affidavit containing only opinions and conclusions will not support a finding of probable cause for the issuance of a search warrant. See, generally, *Aguilar v. Texas, supra; Spinelli v. United States,* 393 U.S. 410, 89 S. Ct. 584 (1969). The magistrate must be presented facts and not conclusory statements if he is to perform his detached function and not become a rubber stamp for the police. Thus, warrants should not be sustained when to do so would dilute "important safeguards that assure that the judgment of a disinterested judicial official will interpose itself between the police and the citizenry. [Footnote omitted.]" *Spinelli v. United States, supra,* 393 U.S. at 419, 89 S. Ct. at 591.

Turning to the affidavit here, the most that could have been determined was that Berroteron and Short were visitors at Petitioner's residence the evening prior to their being detained at the airport and cocaine seized from their person. All other observations made by the surveilling agents with regard to their arrival, overnight stay, and subsequent departure, were, as a panel of the Ninth Circuit stated, "consistent with innocent behavior" (Appendix "B," p. 4). Thus, it is clear that the agents based their opinion that the cocaine seized from Berroteron and Short came

from Petitioner's residence upon merely a "suspicion" or "hunch," not upon articulable facts which could have led a reasonable person to believe that the occupants of the residence had been or were engaged in criminal activity.

The inability of the Government in the present case to justify the issuance of a search warrant for Petitioner's residence based upon the activities observed is made clear through an analysis of, and comparison with, several cases. First, it must be realized that the only facts which can give rise to probable cause are facts which deal with criminal activity. This particular point was specifically made in *Sibron v. New York,* 392 U.S. 40, 88 S. Ct. 1889 (1968), when the Court stated:

> "Turning to the facts of Sibron's case, it is clear that the heroin was inadmissible in evidence against him. The prosecution has quite properly abandoned the notion that there was probable cause to arrest Mr. Sibron for any crime at the time Patrolman Martin accosted him in the restaurant, took him outside and searched him. The officer was not acquainted with Sibron and had no information concerning him. He merely saw Sibron talking to a number of known narcotic addicts over a period of eight hours. It must be emphasized that Patrolman Martin was completely ignorant regarding the content of these conversations, and that he saw nothing pass between Sibron and the addicts. Insofar as he knew, they might indeed 'have been talking about the World Series'. *The inference that persons who talk to narcotic addicts*

> *are engaged in the criminal traffic in narcotics is simply not the sort of reasonable inference required to support an intrusion by the police upon an individual's personal security. Nothing resembling probable cause existed until after the search had turned up the envelopes of heroin.* It is axiomatic that an incident search may not precede an arrest and serve as part of its justification." (Emphasis added.) (392 U.S. at 62 - 63, 88 S. Ct. at 1902 - 1903.)

In *United States v. Moore,* 483 F.2d 1361, 1363 (1973), the Ninth Circuit considered the applicability of this principle with specific regard to innocent conduct. The Court emphasized that "suspicious conduct is not enough" and concluded:

> "Probable cause is lacking 'if the circumstances relied on are susceptible to a variety of credible interpretations not necessarily compatible with nefarious activities'. *United States v. Klandis,* 423 F.2d 132, 136 (9th Cir. 1970), quoting *United States v. Selby* . . . 407 F.2d at 243."

As previously indicated, the *lack* of any observations by the surveilling agents in this case indicating the existence of criminal activity was found by another panel of the Ninth Circuit in holding that the detention of Berroteron and Short at the airport was without even "founded suspicion" (Appendix "B," p. 4). The panel in the present case, to maintain consistency within the Circuit, must therefore have based its opinion upon the mere presence of Berroteron and Short at Petitioner's residence during their stay in San Diego, the only real nexus between the cocaine found on Berroteron and Short and Petitioner. But, considering the deficiency of *any*

specific information indicating Petitioner was the source of the cocaine found on Berroteron and Short, the lack of any criminal record whatsoever of Petitioner, and the fact that Berroteron and Short were *not* under constant surveillance during their stay in San Diego, it is submitted that the single factor of "presence" in and of itself is not sufficient to justify the issuance of a search warrant.

With regard to the specific fact of "mere presence," three factually similar cases again demonstrate the application of the "innocent conduct" principle. In *Mangaser v. United States, supra,* the Court listed the following twelve facts as those relied upon by the Government on the question of probable cause.

> "(1) On three occasions in January, 1963, Daniel Estrada had purchased heroin from Paniagua under the supervision of narcotics agents and on each occasion, Paniagua had driven away from his house to some other location where he apparently obtained the narcotics he was selling.
>
> "(2) On January 28, 1963, Estrada again went to Paniagua's house to buy heroin and was told by Paniagua that some customers in a Buick also wanted to purchase narcotics.
>
> "(3) Followed by the Buick, Estrada drove Paniagua to appellant's neighborhood, and there Paniagua alighted from Estrada's vehicle and spoke to appellants who were sitting in a 1950 Chevrolet which was stopped in the street.
>
> "(4) Paniagua returned to Estrada's auto and asked him for the money—which Estrada gave him.
>
> "(5) As this was being done, appellants drove the red Chevrolet into a driveway and disappeared from view.
>
> "(6) Paniagua walked in the direction their car had gone until he too was lost from sight.
>
> "(7) Estrada then drove a short distance away and met with officers. When he arrived back at his original location, the Buick, with the other 'customers', was still parked at the curb. Soon Paniagua returned and gave Estrada some heroin.
>
> "(8) Paniagua said that Estrada had bought his 'sources' last five quarters and the source had to get some more.
>
> "(9) Almost immediately after this, the red Chevrolet, occupied by appellants, backed out of the driveway and drove away.
>
> "(10) Estrada subsequently met with officers, turned over the heroin, and was found to be without the money previously given him.
>
> "(11) That afternoon appellants reappeared in their Chevrolet and drove into the same driveway.
>
> "(12) They were arrested as they alighted from the car." (336 F.2d at 973.)

In concluding on these facts that the officers did not have probable cause to believe that the appellants had committed an offense, the Court reasoned that these facts established only contact between Paniagua and the appellants, "but whether this *conduct* was a mere innocent conversation or a salutation between acquaintances, or something more, we cannot know." (Emphasis added.) (*Id.*)

"Thus, when the [appellants] were arrested, there

was certainly a possibility that they were the suppliers, but can it fairly be said more than a suspicion existed?" (*Id.*)

The Court answered this question in the negative and reversed the appellants' conviction.

In *United States v. Connolly*, 479 F.2d 930 (9th Cir.), *cert. denied*, 414 U.S. 897, 94 S. Ct. 248 (1973), appellant Connolly had sold two ounces of cocaine to an undercover agent in Los Angeles. The agent continued negotiating with Connolly for the purchase of more cocaine, and on the evening of the next transaction, Connolly's house was placed under surveillance. Just after midnight, Connolly was followed from his house to a house six or seven miles away. Connolly had previously told the agents that the "stashpad" for the cocaine was some two minutes away from his house. The surveilling agents saw Connolly start up and come down a flight of stairs, but did not actually see Connolly enter the house. One of the surveilling agents later testified that he saw Connolly carrying a brown paper bag down the stairs.

As soon as Connolly returned to his house, he was arrested and found in his car was a paper bag containing four ounces of cocaine. After his arrest, Connolly agreed to lead the agents to the house from which he had obtained the cocaine. He took them to what proved to be appellant Jefferson's house. It was the same house that Connolly had visited earlier in the evening. The Jeffersons were arrested inside their house and ten more ounces of cocaine were eventually seized.

In concluding that the evidence seized from the residence

should have been excluded as against Jefferson, as the fruit of an illegal arrest, the Court reasoned:

> "At the outset, the agents lacked probable cause to arrest the Jeffersons when they forced entry. *The agents knew that cocaine had been taken from the Jeffersons' premises not long before they arrived, but they did not know who might be inside the house, how long such persons might have been there, or what relationship these individuals might have to Connolly. All the agents knew was that some contraband probably remained on the premises.*
>
> "Even certain knowledge that contraband is within a dwelling does not constitute probable cause to arrest whoever happens to be inside. See *Johnson v. United States*, 333 U.S. 10, 15 - 17, 68 S. Ct. 367, 92 L. Ed. 436 (1948).
>
> "The intrusion into the Jefferson house fares no better if it is seen as an entry to search rather than to arrest. 'Belief, however well founded, that an article sought is concealed in a dwelling house, furnishes no justification for a search of that place without a warrant.' *Agnello v. United States*, 269 U.S. 20, 33, 46 S. Ct. 4, 6, 70 L. Ed. 145 (1925). To hold otherwise would be to say, paradoxically, that when police have probable cause for a warrant they need not obtain a warrant. The agents violated the Fourth Amendment by entering the dwelling. [See citations omitted.]" (479 F.2d at 936.)

Finally, in the case of *Acosta v. Beto*, 397 F. Supp. 89

(S.D. Tex. 1968), the Court was also confronted with the question of whether the fact that a known narcotics dealer visited the petitioner's house would be adequate to support a finding of probable cause. The Court held:

> " . . . The affidavit alleging that affiants received reliable information from credible persons that accused possessed heroin at named address, that on or about four prior occasions the credible person had given information concerning possession of narcotics by certain individuals, that on every occasion the information had proved to be true, that based on this information the affiants set up a surveillance of the house at named address from 7:00 o'clock to 10:00 o'clock and observed known users of narcotics to enter the house and remain five minutes and leave was insufficient to show probable cause for the issuance of a search warrant." (397 F. Supp. at 94.)

If the Court could not find probable cause with the tip of a proven reliable informant and the above-corroborating circumstances, then the comparable innocent activities described in the instant case surely did not constitute probable cause for the issuance of a search warrant.

A re-examination of the voluminous cases decided by this Court and the Ninth Circuit Court of Appeals will reveal that both Courts have uniformly demanded much more incriminating behavior on the part of a suspect, as confirmed by either an informant, an undercover officer, or observations by surveilling agents, before a finding of probable cause can be made. In light of the fact that the affidavits in the

instant case did not contain such first-hand information, and the fact that absolutely no criminal activity was observed by any surveilling agent to have taken place at Petitioner's residence, it is submitted that the search warrant for that residence was issued without probable cause and that all evidence seized pursuant to the illegally issued warrant should have been suppressed.

CONCLUSION

For the above-mentioned reasons, Petitioner JOHNNY W. BOWMAN respectfully requests that this Honorable Court grant the instant Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX "A"

MEMORANDUM

In the United States Court of Appeals for the Ninth Circuit.

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. JOHNNY WALDEN BOWMAN, Defendant-Appellant.

No. 78-3630.

[Filed June 26, 1979]

On Appeal from the United States District Court for the Southern District of California.

Before: BARNES, MERRILL and TANG, Circuit Judges.

Appellant was convicted of possession of cocaine with intent to distribute. He assigns as error the failure of the district court to suppress evidence obtained in a search of his house pursuant to warrant. He contends that the affidavits on the basis of which the warrant was issued were insufficient to establish probable cause to believe that a search of the premises would produce evidence of narcotics violations.

The affidavits establish the following facts: San Diego officers had placed two persons under surveillance at the San Diego Airport at 10:15 p.m., March 29, 1978. The two persons left the airport in a taxi and were followed by police to appellant's house. They did not drive to appellant's door, but at 10:55 p.m. were let out a block and a half away, from which point they walked to the house. Thereafter, on two occasions during the night, at 11:20 and 11:50 p.m., activity

in the neighborhood (the noisy loading of a car in front of a house two doors away; the passage across the house of the headlights of a car making a full turn nearby) was followed by the extinguishing of all lights in appellant's house. A face then was observed peering out the front window between the draperies for a period of a few minutes sufficient to enable the sources of disturbance to be ascertained. The lights in the house then came on again. The next morning police followed the two visitors back to the airport. There they were stopped, questioned and searched, and cocaine in commercial quantity was found on their persons.

The question presented is whether these facts provided a rational connection between the cocaine recovered from the visitors and the house where they had spent the night sufficient to warrant an inference that the cocaine had been obtained there and that a search of the house would produce evidence of narcotics traffic. In our judgment, the extraordinary manner in which the visitors approached the house and, after their arrival, the manner in which those in the house reacted to street activity, could rationally give rise to an inference that those in the house wished to avoid discovery of what was occurring there (or was later to occur). When the cocaine was seized at the airport a rational explanation for the extraordinary conduct emerged and provided the necessary connection.

Appellant also contends that the search of the two visitors at the airport was unlawful (it was so held by the district court in criminal proceedings taken against them), and that the product of that unlawful search could not be relied on in the affidavits supporting a warrant for the search of appellant's house. Appellant, however, has no standing to assert invalidity of the airport search. There was neither intrusion upon his privacy nor on any property rights of his in that which was seized. *United States v. Rakas,* ..... U.S. ..... (1978). Nor was there automatic standing. While appellant was charged with possession of cocaine, it was not the cocaine seized in the unlawful search that he was charged with possessing.

Judgment affirmed.

APPENDIX "B"

ORDER

DO NOT PUBLISH

In the United States Court of Appeals for the Ninth Circuit.

UNITED STATES OF AMERICA, Plaintiff-Appellant, vs. DAVID J. BERROTERON, Defendant-Appellee.

No. 78-2232.

UNITED STATES OF AMERICA, Plaintiff-Appellant, vs. RODNEY E. SHORT, Defendant-Appellee.

No. 78-2233

[Filed February 20, 1979]

Before: BROWNING and ANDERSON, Circuit Judges, and CLAIBORNE*, District Judge.

The Government appeals from a pre-trial order of the United States District Court, Southern District of California, granting a motion to suppress. The trial court held that the police officers did not have a founded suspicion upon which to detain the Appellees and, therefore, the fruits of the illegal detention had to be suppressed. Cf. *United States v. Barragan-Martinez,* 504 F.2d 1155, 1157 (9th Cir. 1974). We agree. It appears to us that the officers could not have been aware of specific, articulable facts, together with rational inferences therefrom, which reasonably warranted suspicion that criminal activity was afoot (Cf. *United States v. Brignoni-Ponce,* 422 U.S. 873, 884, 95 S. Ct. 2574, 2582, 45 L. Ed. 2d 607 (1975)), at the time of detention in the airport security-check area. Every act of the appellees which the officers observed, up to that point, was consistent with innocent behavior, and the officers reasonably should have believed this. Cf. *United States v. Holland,* 510 F.2d 453, 455 (9th Cir.), *cert. denied,* 422 U.S. 1010 (1975).

Affirmed.

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*The Honorable Harry E. Claiborne, United States District Judge for the District of Nevada, sitting by designation.

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
County of Orange)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Orange, State of California, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 326½ Main Street, Huntington Beach, California 92648, that on OCTOBER 16 1979, I served the within PETITION FOR WRIT OF CERTIORARI (BOWMAN vs. UNITED STATES OF AMERICA) on the following named parties by depositing the designated copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Huntington Beach, California, addressed to said parties at the addresses as follows:

WADE H. McCREE, JR.
SOLICITOR GENERAL
U. S. DEPARTMENT OF JUSTICE
WASHINGTON, D. C. 20530 (3 copies)

MICHAEL H. WALSH
U. S. ATTORNEY
SOUTHERN DISTRICT OF CALIFORNIA
940 FRONT STREET
SAN DIEGO, CALIFORNIA 92189 (3 copies)

I declare under penalty of perjury that the foregoing is true and correct.

Executed on OCTOBER 16 1979, at HUNTINGTON BEACH, CALIFORNIA.

D. A. Standefer

41 COPIES TO U. S. SUPREME COURT, WASHINGTON, D. C. 20543
with Check No. 2392 of Michael Pancer in the amount of $100
–as docket fee–attached to the original copy thereof.
(Sent via Express Mail.)

Dean-Standefer, 326½ Main St., Huntington Beach, Ca. 92648
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